Attorney fees
Action to enforce contract
Bad faith
Costs of litigation

Cuda v. Hill — Adv. No. 92-3479-dds
In re Stephen B. Hill — Bankr. Case No. 92-33023-dds7

8-12-94 PSH Unpublished

Debtor successfully defended a suit alleging nondischargeability of a debt due to fraudulent misrepresentation in the sale of a business. Debtor then moved the court for an award of attorneys' fees under either of two theories: (1) a provision in the sales contract allowing attorneys' fees to a prevailing party, and (2) bad faith on the part of the plaintiff in bringing the action.

The Court disposed of the first theory by holding that the action in bankruptcy court was not an action to enforce the contract, but rather was an action authorized solely under the Bankruptcy Code.

In holding that the debtor did not show bad faith on the part of the plaintiff and was thus not entitled to an award of attorneys' fees under the second theory, the Court looked at the following factors: (1) whether there was a colorable claim, (2) whether the party seeked and followed legal advice, (3) whether the party resisted discovery, (4) the extent to which the allegations were supported at trial, (5) the extent to which the party used dilatory tactics during pretrial and trial, (6) the extent to which the party failed to meet court-imposed deadlines, and (7) the party's litigation history.

The court did allow an award of costs reasonably incurred by the debtor in defending the action, much of which costs the Court felt could have been avoided had the plaintiff acted more prudently.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

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| IN RE | ) | |
| | ) | |
| STEPHEN B. HILL, | ) | Case No. 92-33023-dds7 |
| | ) | |
| Debtor. | ) | |
| | ) | |
| FRED B. CUDA; RICHARD S. CUDA; FBC SALMON COMPANY; FBC SALMON FARMS, INC.; and ROGUE RIVER SEAFOOD COMPANY, | ) | Adversary No. 92-3479-dds |
| | ) | |
| Plaintiffs, | ) | |
| vs. | ) | |
| | ) | |
| STEPHEN B. HILL, | ) | |
| | ) | MEMORANDUM OPINION |
| Defendants. | ) | |

The debtor, Stephen Hill, having successfully defended a suit against him alleging nondischargeability of a debt incurred through fraudulent representations in the sale of a business, has moved the court to assess his attorney's fees against the plaintiffs (referred hereinafter altogether as "Cudas" unless otherwise stated). He claims the right to attorney's fees under the terms of the purchase agreement between the parties. Alternately, he claims

that fees are awardable because the plaintiffs have brought this action in bad faith, vexatiously or with intent to harass.[1] The first basis is rather quickly disposed of. The second is not. They are addressed in turn. In addition, the plaintiffs have objected to certain of the defendant's costs.

Attorney's Fees Based on Contract

Mr. Hill asserts that paragraphs 8.2 and 8.8 of the purchase agreement between the parties as well as certain rulings this court made in its opinion addressing the issue of nondischargeability support a finding that he is entitled to attorney's fees based on the contractual provisions. Paragraph 8.2 states:

> In the event of litigation to enforce this agreement or any provision of this agreement, the prevailing party shall be entitled to recover its reasonable attorney's fees, including fees on appeal or review, if any, in addition to other relief awarded.

Paragraph 8.8 states:

> This agreement constitutes the entire agreement between the parties pertaining to its subject matter and it supersedes all prior contemporaneous agreements, representations, and understandings of the parties. No supplement, modification, or amendment of this agreement shall be binding unless executed in writing by all the parties.

[1] Mr. Hill may not obtain fees pursuant to 11 U.S.C. § 523(d) because the litigation did not involve a consumer debt. The parties have not addressed the issue of whether a debtor who successfully defends a nondischargeability action may be awarded fees under circumstances which fall outside § 523(d). Accordingly, this court will assume, for purposes of this case, that he may.

The parties litigated the matter before this court under 11 U.S.C. § 523(a)(2)(A) with bifurcation of the issue of the amount of damages to be tried later, if necessary. Therefore, the issues the court had to determine were, within the context of each of the counts, 1) whether the defendant made a representation; 2) whether he knew at the time that the representation was false; 3) whether he made the representation with intent to deceive the plaintiffs; 4) whether the plaintiffs justifiably relied on the representation; and 5) whether any representations were the proximate cause for any damages incurred. See In re Kirsh, 973 F.2d 1454, 1457, 1460 (9th Cir. 1992).

Mr. Hill argues that in its opinion on dischargeability the court enforced the provisions of paragraph 8.8 to limit the extent to which the plaintiffs could present evidence of representation or reliance. Therefore he is entitled to fees under the provisions of paragraph 8.2. However, this was not an action "to enforce this agreement or any provision of this agreement . . . ." It was an action authorized solely under the Bankruptcy Code to determine the dischargeability of a debt. It is clear that in the Ninth Circuit, where the litigated issues involve not basic contract enforcement questions but issues peculiar to federal bankruptcy law, attorney's fees will not be awarded absent bad faith or harassment by the losing party. See In re Fobian, 951 F.2d 1149, 1153 (9th Cir. 1991) (citing Collingwood Grain, Inc. v. Coast Trading Co. (In re Coast Trading Co., 744 F.2d 686, 693 (9th Cir. 1984)). Mr. Hill

may not collect his fees based on the provisions of the purchase agreement.

Attorney's Fees Based on Bad Faith, Vexatiousness, Harassment

Most attorneys know that in the United States, unlike England, each party to a litigation usually is responsible for the payment of their own attorneys' fees absent statutory or contractual authorization allowing recovery from the opposing party. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975). There are exceptions to this rule, including an award of fees, when, in the court's equitable determination, a party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." Hall v. Cole, 412 U.S. 1, 4-5, 93 S.Ct. 1943, 1945-46, 36 L.Ed.2d 702 (1973) (quoting 6 J. Moore, Federal Practice ¶ 54.77[2], at 1709 (2d ed. 1972)). This award is punitive in nature. Consequently, there must be a finding of bad faith on the part of the person against whom fees are assessed. Id. at 15, 93 S.Ct. at 1951. Bad faith may be found in the filing of the lawsuit as well as in the conduct of the litigation. Id. Of most importance, fees awarded for this purpose may be imposed "only in exceptional cases and for dominating reasons of justice." United States v. Standard Oil Co. of Calif., 603 F.2d 100, 103 (9th Cir. 1979) (quoting 6 J. Moore, Federal Practice ¶ 54.77[2], at 1709-10 (2d ed. 1972)).

When a court addresses a request for attorney's fees on this basis it enters into a delicate process of balancing alternate policy goals. Courts do not wish to deter the filing of legitimate, although risky, claims. Further, the court should allow the parties some flexibility in the discovery and pretrial process, recognizing that it is reasonable to assume that as the case proceeds the position of the parties may necessarily change. Conversely, a party should not be burdened by the expense and anxiety incurred through misuse of the judicial process by the losing party. This latter concern is heightened when allegations of fraudulent conduct are present.

There are few Ninth Circuit decisions binding on this court which address the specific legal standards to apply in determining the presence of bad faith, vexatiousness or harassment. Because the award of fees for bad faith, vexatiousness or harassment is an exception to the American Rule and because the award arises through exercise of the court's equitable powers, I have decided that the following standards are applicable.

Mere lack of success does not constitute evidence that the claim was filed in bad faith, filed out of vexatiousness or filed for purposes of harassment. Evidence of failure to settle, alone, is also not indicative if the offer included a release of the losing party's claims. See Juras v. Aman Collection Services, Inc., 829 F.2d 739, 745 (9th Cir. 1987). The court must inquire into the party's actual motivation in filing or pursuing the suit.

The court is not determining what a reasonable person would have done under the circumstances. However, lack of reasonableness is a factor to be weighed with others in determining motivation.

Some courts have held that where a "colorable" claim has been stated it precludes a finding of bad faith. See Nemeroff v. Abelson, 620 F.2d 339, 348 (2nd Cir. 1980).

> A claim is colorable . . . when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that facts supporting the claim might be established not whether such facts actually had been established.

Id. (Emphasis in original). This court disagrees that stating a colorable claim should prevent further consideration. There may be circumstances where the losing party, having received poor legal advice, may file a totally meritless claim in good faith. Contrarily, there may be circumstances where she may file a claim with some merit but litigate it vexatiously or for purposes of harassment. This court considers the existence of a "colorable" claim as merely some evidence of proper motivation.

This court will also inquire into the following. Did the party seek and follow legal advice? Did the party resist discovery? To what extent were the allegations supported by evidence at trial? To what extent did the party use dilatory tactics, including discovery, during pretrial and trial? To what extent did the party fail to meet court-imposed deadlines? Do the parties have any other litigation history, either pre or post bankruptcy filing?

Application of Legal Standard to Facts

1. Evidence at Trial

The plaintiffs' allegations arose out of their purchase in February 1989 of a southern Oregon coastal salmon ranch and fish processing facility. Defendant was president and majority stockholder of two corporations operating the business. In the final pretrial order the plaintiffs alleged:

1) defendant misrepresented in the [ranch's] Business Plan higher than actual salmon release and return rates; defendant and Mr. Coe [manager of the salmon ranch and fish processing facility and officer and/or minority shareholder of both corporations] orally represented the accuracy of the higher than actual return rates;

2) revenue projections in the Business Plan for 1989 were highly unlikely given actual historic return rates of fish; defendant and Mr. Coe told plaintiffs they could expect substantial revenues in future years from returning salmon;

3) defendant misrepresented in the Business Plan that, except in Los Angeles, San Francisco and Japan, Mr. Coe marketed the business's chinook salmon directly to distributors and retailers when in fact the business was heavily dependent upon fish brokers who charged significant commissions and that Mr. Coe had little experience marketing fish; defendant orally misrepresented Mr. Coe's marketing experience;

4) defendant knew, or should have known, and failed to disclose that the business facilities contained materially defective equipment that was in gross disrepair and required substantial, expensive repairs;

5) defendant misrepresented in the Purchase Agreement that all permits and licenses necessary for the operation of the existing business were in place at that time;

6) defendant misled plaintiffs by implying in the Business Plan that the facilities could be expanded into a

potentially profitable operation without any additional permits or licenses and that the business then had all permits and licenses necessary to operate the business when in fact the business lacked the proper permits to operate as well as those needed for expansion under the plan;

7) defendant orally assured Fred Cuda, as did his purported agent, Mr. Coe, that the proper permits were in place to operate and to expand in accordance with the Business Plan;

8) defendant and Mr. Coe orally assured Fred Cuda that the business enjoyed favorable regulatory treatment from the State of Oregon and its administrative agencies when in fact they knew at that time that there was a very hostile regulatory environment in Oregon with respect to salmon ranches and farms and that it was likely that this hostile regulatory environment would have a severe negative impact on plaintiffs' operation of the fish businesses;

9) defendant knew these material misrepresentations were false; defendant intended that plaintiffs would rely on these materially false statements; plaintiffs relied on these materially false statements and but for such statements would not have purchased the business; plaintiffs were unaware of the misleading nature of the oral and written misrepresentations set forth above and of the material omissions by defendant; the business failed and the reasons for such failure are directly linked to the misrepresentations and omissions set forth above.

As can be seen from the allegations, evidence of Mr. Coe's agency relationship to Mr. Hill was essential to some of the plaintiffs' case. In fact I found that the lion's share of plaintiffs' personal contacts prior to the purchase were with Mr. Coe rather than with the defendant. Yet the sole direct evidence plaintiffs presented of Mr. Coe's alleged agency was a statement made by the defendant to Fred Cuda at their initial meeting. I found the plaintiffs presented no evidence to support a finding

that the defendant conferred actual authority on Mr. Coe to act as his agent. I found that Mr. Coe was Mr. Hill's apparent agent for purposes of showing Fred Cuda the facilities on his first visit. But the evidence did not show what representations Mr. Coe made, if any, to Fred Cuda on that visit. I further ruled in my October 15, 1993 letter opinion:

> Plaintiffs presented no evidence to support a finding that Mr. Coe's apparent agency lasted beyond the first visit. Even if Mr. Coe were the defendant's agent past the first visit to the facilities in August 1988 at some point in the fall of 1988 he became a confidant of Mr. Cuda's, holding discussions with Mr. Cuda about which the defendant had no knowledge. During this period it was not reasonable to assume there was any continuing apparent agency conferred by the defendant to Mr. Coe.

I made further findings on the claims as follows:

> Plaintiffs failed to present any evidence that the actual salmon release and return rates . . . in the . . . Business Plan were inaccurate . . . . All testimony indicated the salmon release and return rates shown in the . . . Business Plan were derived from actual . . . records which were identified . . . as accurate. Mr. Cuda admitted on cross-examination that he did not know of any facts to support his belief that salmon release figures in the . . . Business Plan were overstated . . . . Significantly, the origins of the release and return data, an explanation of the methodology used to calculate the return rates for each year, and an explanation of how the average rate was derived are all fully disclosed in the . . . Business Plan.
>
> * * *
>
> The methodology the defendant employed in calculating the actual . . . return rates for years 1985-87 is fully explained, cross-referenced, and disclosed in the . . . Business Plan at pages 45-46. The fact that the 3.22% average return rate used in . . . revenue projections for 1989 is a straight mathematical average is also fully disclosed . . . . [P]laintiffs failed to present any evidence that the average return rate of 3.22% represented in the . . . Business Plan at the time of its publication in December 1987 was false.

Exhibit H-7, which the parties agree was given to Mr. Cuda along with the . . . Business Plan, shows actual income received . . . from sales of returning salmon for 1986 and 1987. Plaintiffs had this historical . . . information available to them for comparison to the revenue projections. The plaintiffs failed to present any evidence that the . . . historical revenue figures in Exhibit H-7 were inaccurate.

* * *

Expressions of opinion are not misrepresentations of fact, unless the parties are not on equal footing and do not have equal knowledge or means of knowledge. [citation omitted] . . . . However, "financial projections made with the knowledge that they were false and unreasonable may be the basis for an allegation of common law fraud." [citation omitted] In order for the plaintiffs to prevail on their allegation that revenue projections in the . . . Business Plan for 1989 were fraudulent, they must either show that the revenue projections were made with knowledge they were false and unreasonable or show that the parties were not on equal footing and did not have equal knowledge or means of knowledge. The court finds that the plaintiffs failed to present <u>any</u> evidence that the revenue projections for 1989 contained in the . . . Business Plan were made with knowledge they were false or unreasonable at the time the business plan was prepared in December 1987.

* * *

The court further finds that the plaintiffs failed to present any evidence that the parties were not on equal footing and did not have equal knowledge or means of knowledge regarding the revenue projections for 1989.

* * *

The court finds that Mr. Cuda's revenue projections in his [own] business plan for salmon ranching in 1989 were substantially similar to the figures in [Hill's] Business Plan.

* * *

Plaintiffs were also unjustified in relying on any representations not contained in the Purchase Agreement itself . . . . The plaintiffs' attorneys specifically negotiated the language in the Purchase Agreement which stated that the Purchase Agreement and the representations contained therein superseded all prior agreements and representations between the parties . . . . This integration clause is applicable unless its enforcement "would be unconscionable or . . . its specific inclusion was due to duress, overreaching, undue influence, or fraud." [citations omitted] Plaintiffs failed to allege in the amended pretrial order, and

failed to present any evidence, that the integration clause was included in the Purchase Agreement by duress, overreaching, undue influence, or fraud -- nor could they. Their attorneys drafted the Purchase Agreement.

* * *

The plaintiffs failed to present any evidence that the business failed because of false revenue expectations from the salmon ranching operation.

* * *

The court finds the plaintiffs failed to present any evidence that any of the representations contained in the Marketing Plan section of the . . . Business Plan relating to Mr. Coe's marketing experience were false.

* * *

Assuming [there] was a misrepresentation [in the Marketing Plan section of the . . . Business Plan relating to Mr. Coe's marketing experience], the plaintiffs failed to present any evidence that the defendant knew that it was false or that the representation was made with reckless disregard for the truth.

* * *

Even if [we] assume falsity and knowledge, the plaintiffs failed to present any evidence that the defendant intended to deceive the plaintiffs by this statement.

* * *

Even if we assume deceptive intent, plaintiffs could not justifiably rely on this information to purchase the business. The . . . Business Plan was only intended to solicit <u>investors</u>, not buyers, and plaintiffs failed to present any evidence that the defendant represented that Mr. Coe's services and marketing method would be sold with the business.

* * *

Plaintiffs failed to present any evidence that this representation was the proximate cause of their damages . . . . The plaintiffs failed to present any evidence that the difference between the success and failure of their business hinged on revenue lost on brokers' commissions.

* * *

The plaintiffs failed to present any evidence that the defendant made any oral representations regarding Mr. Coe's marketing experience.

* * *

The court finds that the defendant disclosed all open defects by allowing the plaintiffs to have anyone they wanted inspect the facilities and equipment . . . . Mr. Cuda was aware of the obvious need for major repairs at the pumping station and saw 18 inches of water on the

floor of the pump house and exposed electrical wiring. Plaintiffs knew going into the sale that the ocean pumping station needed major improvements. They had ample opportunity to inspect all equipment and facilities. In late October or early November 1988, plaintiffs hired an engineer, Ron Mayo, to look over the facilities . . . . Mr. Cuda testified that he did not pursue [Mr. Mayo's] study because he and Mr. Coe thought it would be a waste of money.

* * *

The facilities were sold "as is".

* * *

Plaintiffs failed to present any direct evidence that the defendant failed to disclose any known latent defects in equipment. They alleged in the amended pretrial order only one undisclosed latent defect with sufficient particularity -- that the [fish processing facility's] discharge pipe was in need of $30,000 in repairs. Plaintiffs failed to present any evidence regarding this allegation. Mr. Coe testified that the pipe was in good condition and merely required a nominal annual expense to repair.

* * *

The court's reasoning and prior conclusions regarding deceptive intent and causation apply equally here. Plaintiffs failed to present any evidence that the business failed because of latent equipment defects.

* * *

The defendant . . . misrepresented in the Purchase Agreement that all permits and licenses necessary for the operation of the existing business were in place at the time of sale.

* * *

Plaintiffs failed to present any evidence that the defendant knew he needed well permits or a water use permit for [one] site, or that he was told he needed them.

* * *

As an attorney [defendant] knew the significance of [the] representation [that all permits and licenses necessary for the operation of the existing business were in place at the time of sale] and will be held accountable for making it in reckless disregard for the truth.

* * *

[However] the defendant lacked the actual intent to deceive the plaintiffs by this misrepresentation.

* * *

Assuming deceptive intent, the court finds the plaintiffs were not justified in relying on this misrepresentation.

* * *

The court reiterates its findings that the plaintiffs were sophisticated business persons who were represented by attorneys in an arm's length transaction. The permits were a matter of public record.

* * *

Assuming the plaintiffs were justified in relying on the defendants representation [regarding the permits], plaintiffs have not demonstrated to the court that they were damaged as a direct result of this misrepresentation.

Mr. Drolet and Mr. Mattick of the Water Resources Department each stated that if there had been a valid water use permit for the initial 4 wells drilled in 1987 a new permit would still have been required for the 9 additional wells drilled by plaintiffs in 1989.

* * *

The plaintiffs have not presented any evidence that [the business] would not have been issued well permits and a water use permit for the existing facility had it applied for them in 1988; nor have plaintiffs presented any evidence that they would not [have] been issued well permits and a water use permit had they applied for them in 1989 . . . . Policy changes within the regulatory agencies, coupled with the fact that the plaintiffs greatly expanded operations, were the cause of the regulatory difficulties plaintiffs encountered.

* * *

In the entire . . . Business Plan there is only one reference to permits and licenses. The Plan represents [the business] had a valid rear and release permit from the ODFW to release up to 5 million salmon per year. This was true.

* * *

Plaintiffs allege that the defendant orally assured Mr. Cuda, as did his purported agent, Mr. Coe, that the proper permits were in place to operate and to expand in accordance with the [existing] Business Plan.

This court has not heard any convincing evidence of these oral representations by the defendant or Mr. Coe. If made, this court assumes these representations were false [for] lack of well and water use permits. The same analysis and conclusion applies as discussed [above] -- plaintiffs likewise failed to prove deceptive intent, justifiable reliance, and causation of damages to support this claim.

* * *

Plaintiffs failed to present any evidence that the defendant, Mr. Coe or any . . . personnel had any contact with the relevant regulatory agencies that in any way

> suggested they knew there was a hostile regulatory environment surrounding salmon ranching or farming . . . . Mr. Cuda admitted at trial that he knew of no fact suggesting that the defendant knew of, or was reckless in failing to disclose, a hostile regulatory environment . . . . It was simply his own impression that the defendant knew or should have known.

Court's October 15, 1993 Letter Opinion, at 7-31. As can be seen from the court's findings, the plaintiffs failed to present any evidence to support most of the elements on all of the allegations. Further, the evidence which was presented, by both sides, supported a finding of numerous situations in which Fred Cuda, during and after the purchase, either took steps or failed to take steps which played a direct role in his ultimate economic loss. Because they were his actions or inactions, he had to have known of them before he filed this suit against the defendant. All of this is significant evidence that the plaintiffs filed the suit in bad faith.

The court, however, did find that Mr. Hill misrepresented, with reckless disregard of the facts, that the business had all permits and licenses necessary for its existing operations. The evidence showed that through their contacts with the State of Oregon the plaintiffs had valid reason to believe this to be true when they filed this suit.

2. Other Litigation History

The bankruptcy court was only the last court in which the parties filed legal pleadings to litigate their controversies arising out of the sale of the salmon ranch. Mr. Hill testified

that problems between the parties began within a few months of the sale closing. As a result of the sale, Mr. Hill and other shareholders of the selling corporations had become creditors of the buyer corporations. Mr. Hill approached Mr. Delo, who represented the buyer corporations for purposes of attempting refinancing of the debt, about certain contract violations he perceived by the Cudas. Correspondence between the parties reflects attempts to settle their differences starting in August, 1990. Mr. Delo was initially concerned about restructuring his clients' debt to the sellers. By letter of August 23, 1990, the Cudas stated they believed that Mr. Hill had misrepresented and omitted certain information during the sales negotiations and offered a full settlement of all controversies. Mr. Hill testified that he rejected this offer because it was contingent on successfully closing negotiations with the U.S. Bank, the SBA, and a third party for a joint venture agreement, and that he did not think those conditions would occur.

His early letters reflect that Mr. Hill indicated his intent to foreclose on the Cudas' operation sometime in the fall of 1990. On January 29, 1991, Mr. Delo wrote a letter to Mr. Hill rejecting a settlement offer but making a counteroffer which again included full settlement of all claims against the sellers. Mr. Hill rejected this offer but encouraged further discussions regarding a voluntary foreclosure on the property. Meanwhile, on February 1, 1991, Mr. Hill and the sellers filed a foreclosure action in Curry

County Circuit Court and asked that a receiver be appointed. Mr. Coe, one of the circuit court plaintiffs, was appointed receiver.

Almost simultaneously the buyers filed a securities fraud suit against the sellers in federal district court. The Cudas' primary goal in this suit was to obtain all the funds they had put into the failing salmon operation. They also raised allegations of fraud in the state foreclosure suit. Thereafter the parties continued their settlement negotiations through December, 1991. Although there were continued discussions about a global settlement, the Cudas ultimately would not agree to include their securities claims in any settlement.

There was contradictory testimony about Mr. Delo's comments regarding his clients' motivation. Mr. Wilgers, who represented Mr. Hill at the state court litigation, testified that Mr. Delo had stated that the Cudas held great animosity toward Mr. Hill, viewed the litigation as a matter of family honor and were willing to pay whatever fees it took to prevail. Mr. Wilgers testified that he had never been involved in a case where economic reality had so little to do with the litigation. Mr. Delo denied making these statements. He stated his clients' goals were strictly economic; that they had never suggested that they were pursuing a personal vendetta. He further stated that Mr. Hill told him that the Cudas were very rich and that Fred Cuda was a spoiled little rich kid, but he did not get the impression that Mr. Hill was hostile to the Cudas personally.

Mr. Markley represented Richard and Ellen Cuda individually, due to their personal investment in the purchase of the salmon ranch. He testified that he did not ever hear either make a statement which suggested that they were pursuing the claims against Mr. Hill because of a personal vendetta. They only wanted a return of the assets they had invested in their son's salmon ranching and farming operation.

In early 1992 the foreclosure suit was settled and on the plaintiffs' motion the circuit court terminated the receivership. In his letter opinion, the circuit court judge criticized Mr. Hill and Mr. Coe, stating that the receivership was set up for the benefit of the plaintiffs and not for the good of all the creditors.

Mr. Hill filed a Chapter 7 bankruptcy petition on May 1, 1992. The Cudas' securities case against the sellers was still pending at the time of the trial in the dischargeability action. A review of the securities case pleadings shows that the allegations of misrepresentation and omission of known facts against the sellers are essentially identical to the allegations in the dischargeability suit.

After Mr. Hill filed bankruptcy the Cudas amended their securities complaint to include an allegation against Mr. Hill of legal malpractice based on negligence for failure to comply with the requirements of state and federal securities law in connection with the sale of the ranch. This amendment was for the purpose of

pursuing Mr. Hill's malpractice insurance carrier. But Mr. Hill's malpractice policies exclude coverage for fraud.

The complaint was later amended again to allege, rather, negligence by Mr. Hill in representing one of the corporations (the Cudas had purchased all the corporation's stock) for failing to obtain the necessary permits to operate the ranch. There was no testimony as to how, given Mr. Hill's personal bankruptcy, a personal judgment could be entered against him on this claim.

3. Pretrial Experience in This Adversary Proceeding

I did not preside during the pretrial events in this lawsuit. Therefore I do not have direct knowledge of this element. I have, however, reviewed the pleadings in the file and heard evidence from the parties.

After the Cudas filed their dischargeability complaint Mr. Hill filed a motion to make more definite and certain. The court granted the motion and the plaintiffs filed an amended complaint. The case went to trial on a third amended complaint. This court does not know under what circumstances the complaint was amended a second time. I note that the first complaint contained allegations of violation of the federal and state securities law and Oregon common law fraud as well as allegations under 11 U.S.C. § 523(a)(2)(A). The first three claims are of legal relevance in bankruptcy only to the extent they support a finding of nondischargeability under § 523. The third amended complaint did not contain allegations other than those under § 523.

Mr. Hill submitted interrogatories to the plaintiffs to attempt to get them to identify with more preciseness the nature of the alleged misrepresentations. The plaintiffs' response to those interrogatories was very brief and perfunctory. They stated damages had not yet been calculated and experts had not yet been identified. They ignored the request to itemize each misrepresentation alleged and identify the date, time, speaker or writer, recipient, form and content. Instead, they essentially reiterated the general allegations in the complaint. They lumped together the names of possible witnesses for all misrepresentations. In short, the response to interrogatories was of no use to the defendant. Due to lack of funds Mr. Hill decided not to file any more preliminary motions to obtain more specificity regarding misrepresentations. Rather, he deposed Fred Cuda for several days. One day was spent attempting to identify the alleged misrepresentations.

The Cudas hired N. Robert Stoll to file their securities case and their 11 U.S.C. § 523 complaint. Mr. Stoll testified that he regularly screens cases before accepting them by evaluating the claims. In evaluating this case, for which he charged $10,000, he concluded that it was very complex factually but thought that they had better than a 50-50 chance of succeeding. He felt both the securities and dischargability actions were meritorious. He felt the claim that defendant misrepresented the existence of all necessary permits at the time of sale was particularly substantial.

When asked questions about specific allegations of misrepresentation which appeared in the § 523 complaint he had difficulty remembering to what extent independent determinations of accuracy had been made. It was clear that there were a number of facts which had been revealed at trial which were detrimental to his clients' position which his clients did not tell him.

The securities case was finally settled with some of the defendants. After Mr. Stoll had done considerable work for the Cudas they asked him to continue his representation on a contingency fee basis. He declined and the Cudas then obtained the services of Ms. Susan Widder of the Black Helterline firm.

Ms. Widder represented the Cudas in both the securities case and the dischargeability case from September through December, 1992. Her fee arrangement was a mix of hourly and contingent. She testified she evaluated the dischargeability claims and thought they had merit. She also decided the permit claim was the most substantial. Like Mr. Stoll, when questioned about each specific allegation of misrepresentations, she had difficulty remembering to what extent independent determinations of accuracy had been made. With her, as with Mr. Stoll, it was clear that there were a number of facts revealed at trial which her clients had not told her. During her representation she did not see any sign through either tone or conduct that they were suing Mr. Hill as a result of a personal vendetta. She withdrew from the case for medical reasons related to her pregnancy.

Some nine weeks before the trial the Cudas retained Mr. Robert McGaughey. He was faced with a significant number of documents to review, discovery deadlines and outstanding motions. In addition, the principals had to be deposed. He did not believe that he could address each claim in the time allowed by the court for the trial. Given these facts he decided to pursue Mr. Hill on only some of the claims pled. He believed their strongest two claims were the allegation of lack of permits and Mr. Coe's marketing experience. He testified that going into the trial they had letters from the state that a certain permit essential to the operation of the ranch had lapsed prior to the closing of the sale. It was only on the third day of trial they learned, from testimony of another state official that this information was wrong and that the permit had been issued. He believed that in Fred Cuda's mind the lack of the permit was the primary reason "why everyone started to come down on him."

Mr. McGaughey had read Mr. Hill's business plan to state that Mr. Coe, as marketer for the seller, used brokers in three markets and nowhere else, which was contrary to the facts as revealed after the sale had closed. The Cudas believed the marketing element was very important to the success of the business although Mr. Cuda wrote it.

He testified that there was evidence in the file that the Cudas' eggs and fry hadn't been taken care of and had died while held by the sellers and that he did not know until the first day of

depositions that the Cudas had contracted with Mr. Hill to hold the sellers harmless for the loss of any eggs or fry. He stated that Fred Cuda was surprised at seeing the contract.

He further testified that he had wanted to put on a witness to support the Cudas' claim that the revenue projections and number of fish released and return rates were wrong. However, this witness was excluded from testifying because his name had not appeared on their witness list.

He decided that time did not allow him to put into evidence the volume of documentation to support plaintiffs' claim on the condition of the equipment.

The parties entered settlement discussions within three weeks of trial. The Cudas offered to settle for $50,000 or to go into mediation. Mr. Hill rejected these offers.

4. Conclusion

This was a factually complex case. This has made it difficult for all parties, including the court, to identify specific facts alleged in bad faith. The plaintiffs' first two attorneys stated they had carried out independent investigations and reached the conclusion that there was a reasonable expectation that the facts supporting at least some of the claims might be established. The evidence regarding the Cudas' motivation was inconclusive. Their attorneys advised them to proceed. Their attorneys, both before and after filing the § 523 action, entered into what were clearly serious settlement discussions. The plaintiffs held at least one

colorable claim; there was a misrepresentation that all necessary permits were in place at the time of sale. The plaintiffs were handicapped in presenting their case because of a succession of attorneys, through, apparently, no fault of their own. By the time Mr. McGaughey accepted representation there were only nine weeks until trial, a very short time to prepare for such a complex case. Further, it appears that even at this late date no depositions of the parties had been taken. It is clear that the Cudas did not tell their attorneys all the relevant facts surrounding the failure of their business. At trial many facts regarding Fred Cuda's mismanagement were revealed. However, plaintiffs' failure to inform their attorneys of all relevant facts could have been either intentional or through ignorance. No facts were elicited which support a finding of the plaintiff's bad faith during the pretrial period. This court concludes that the defendant has not shown those exceptional circumstances which support an award of fees for bad faith in this case either for filing or for conduct during litigation.

There are certain aspects of the case which do trouble me. From all the evidence I have received a clear impression that the plaintiffs' attorneys, through insufficient attention to the demands of this difficult case, substantially and unnecessarily increased the length and complexity of the pretrial period and trial in this dischargeability suit. First, the original § 523 complaint contained three legal claims which were not legally

relevant. Second, the response to interrogatories contained either statements calculated to be of no use to the opponent, therefore defeating the purpose behind the requirements of the federal rules of discovery and necessarily increasing Mr. Hill's fees, or statements which revealed the attorneys' own lack of detailed knowledge about, and preparation of, their clients' case. This was after the plaintiffs had spent considerable funds on an independent investigation of the facts supporting their case. Third, the plaintiffs' attorneys were clearly surprised by a number of damaging facts which were revealed either at the Cudas' deposition just before trial, or at trial. The result was that almost all the original allegations, some of which should have been removed due to lack of factual support, were tried. Therefore Mr. Hill had to prepare his defense for all allegations, increasing his costs substantially. From the date of filing the complaint there was more than sufficient time to prepare for trial. There was no explanation why the plaintiffs' attorneys did not know about these facts much earlier.

Costs

Defendant filed a cost bill seeking $7,600.12. Plaintiffs object to $6,453.57 of the total costs, specifically:

A. Deposition and Transcript Costs:

| | |
|---|---|
| Fred B. Cuda: Appearance Fee | $ 750.00 |
| Richard S. Cuda: Appearance Fee | 247.50 |

| | |
|---|---|
| William E. Love: Appearance Fee | 67.50 |
| Fred B. Cuda: Deposition (Vols. I, II & III) | 2,366.61 |
| Richard S. Cuda: Deposition | 562.50 |
| William E. Love: Deposition | 200.00 |
| Stephen B. Hill: Deposition (Vols. I & II) | 319.95 |

B. Witness Fees and Travel Expenses:

| | |
|---|---|
| William Crook: | |
| Trial Witness Fee (1 Day) | 40.00 |
| Subsistence (1 Day) | 50.00 |
| Travel (640 miles @ $.25 per mile) | 160.00 |
| Buck Coe: | |
| Trial Witness Fee (1 of 2 Days) | 40.00 |
| Subsistence Fee (2 Days) | 39.00 |
| Michael Mattick: | |
| Trial Witness Fee (1 of 2 Days) | 80.00 |

C. Costs of Exhibits:

| | |
|---|---|
| Outside Photocopy Costs of Exhibits H-1 through H-166, Depositions, and Transcripts | 1,530.51 |

Deposition costs, as well as copying charges, are taxable under 28 U.S.C. § 1920 if the deposition is necessarily obtained for use in the case. Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175, 177 (9th Cir. 1990). A deposition need not be admitted into evidence in order for its associated costs to be taxable. Rather, it need merely have been necessary for adequate trial preparation or used for cross-examination or impeachment purposes. See Firemen's Fund Insurance Co. v. Standard Oil Co. of Cal., 339 F.2d 148, 157 (9th Cir. 1964). In determining whether

the taking of a deposition was reasonably necessary to the party's case, courts must view its necessity in light of the particular situation existing at the time of taking. Advance Business Systems & Supply Co. v. SCM Corp., 287 F. Supp. 143, 165 (D. Md. 1968), aff'd, 415 F.2d 55 (4th Cir. 1969) cert. denied, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101 (1970).

Plaintiffs contend the costs associated with Fred Cuda's deposition should be disallowed or seriously reduced although defendant used it on several occasions on Mr. Cuda's cross-examination at trial. Plaintiffs also contend that costs associated with Richard Cuda's deposition should be disallowed (albeit without giving any reason why) although it too was used on cross-examination. As discussed earlier, defendant reasonably believed it necessary to depose Fred Cuda in order to identify the details of the plaintiffs' allegations of fraud. As a plaintiff and recipient of the majority of the alleged fraudulent representations, his deposition was not only necessary but essential for trial preparation given the lack of specificity in plaintiffs' pleadings. I find that the length of his deposition was commensurate with the importance of his potential testimony in proving the elements of plaintiffs' case. Likewise, Richard Cuda's deposition was necessary because he was the recipient of some of the alleged fraudulent representations. Further, it was unclear at the time he was deposed whether he would be available to testify at

trial and he was beyond the court's geographic subpoena power. The plaintiffs' deposition costs will be taxed in full.

Mr. Love, the attorney who represented Fred Cuda in drafting the purchase agreement, was also an important witness regarding the integration clause in the purchase agreement which was key in negating plaintiffs' reliance on any representations not contained therein. His deposition was necessary, as it was used at trial to establish waiver of attorney-client privilege, and will be taxed in full.

Plaintiffs contend that the costs of reproducing Mr. Hill's own deposition taken by plaintiffs should be disallowed because he testified in person and the deposition was not introduced into evidence or used at trial. Obtaining copies of depositions taken by opposing parties may be considered necessary in certain circumstances. Alflex, 914 F.2d at 177. The "possibility that the deposition would be used to impeach the party create[s] a reasonable necessity for his purchase of a copy in order to hold the impeachment within proper limits." Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 679 (9th Cir.), cert. denied, 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963). As fraud cases often turn on the defendant's credibility, it was reasonably necessary for Mr. Hill to obtain a copy of his own deposition in order to ensure his trial testimony would be consistent therewith. The costs of reproducing his deposition will be taxed in full.

Witness, travel and subsistence fees associated with subpoenaing a witness for trial are taxable:

> (b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> . . . .
>
> (d)(1) A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.
>
> (2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) to title 5, for official travel in the area of attendance by employees of the Federal Government.

28 U.S.C. § 1821.

The government per diem rate in effect prior to the trial of this case in Portland, Oregon was $97. See 58 Fed. Reg. 12890, 12896 (1993) (to be codified at 41 C.F.R. §§ 301-307).

Witness and travel fees of William Crook will be disallowed in full. Although he was subpoenaed to appear in person and his expenses would have been justified under the circumstances had he appeared, he was eliminated as a witness late in the trial due to time constraints I had imposed at trial. There is no evidence that he actually incurred any expenses or inconvenience. The fact that he was paid and has not returned the funds does not justify taxing them to plaintiffs.

Witness and travel fees of Buck Coe will be allowed in full. Mr. Coe was originally subpoenaed to attend trial on May 12, 1993,

and, because of scheduling changes necessitated by time constraints imposed by me, was served with another subpoena on May 13, 1993 to attend and testify on May 14, 1993. Mr. Coe lived over 100 miles from the court and it was necessary for him to spend an evening in Portland, on May 13 so he could be available to testify for trial early in the morning on May 14. He is therefore entitled to the $40 witness fee for both days and to the subsistence fee of $39 per day which is far less than the $97 allowable per diem fee.

Witness fees of Michael Mattick are allowed in full as he was originally subpoenaed to attend the trial on May 12, 1993 but, due to scheduling problems imposed by the court, was again subpoenaed to testify at the trial on May 14, 1993. Although Mr. Mattick did not appear at trial on May 12, he was available by telephone and could appear with an hour's notice. Mr. Mattick's position with the Oregon Department of Water Resources requires his presence in the field. The subpoena to Mr. Mattick required that he remain available in his office in the event defendant required his testimony on either May 12 or May 14, 1993.

Defendant's photocopy fees will be allowed in full as the copies were necessarily obtained for use in the case pursuant to 28 U.S.C. § 1920. This was a very factually complex case. Defendant marked 166 exhibits of which 91 were received into evidence. Some exhibits were duplicative of plaintiffs' so it was unnecessary to introduce them. The duplication of exhibits, however, did not eliminate the necessity of supplying all the exhibits to the court

and plaintiffs because many of the duplications were not known until exhibits and transcripts were exchanged pursuant to the court's scheduling order. The court disagrees with plaintiffs' contention that many of defendant's exhibits were unnecessary because "[t]he alleged fraud was contained in oral communications, a half dozen letters, a business plan and some contracts." Plaintiffs were unable to establish reliance, causation or damages in part because defendant presented an extensive paper trail establishing that plaintiffs had detailed knowledge of the business and the salmon ranching and farming industries going into the transaction and caused much of their own damages through mismanagement and failure to ensure prior to purchase that they could expand the business according to their own plans under existing environmental regulations.

Defendant will be allowed costs in the amount of $7,350.12 ($7,600.12 sought minus Crook's $250 witness and travel fee).

This Memorandum Opinion contains the court's findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052. An Order consistent herewith will be entered.

POLLY S. HIGDON
Bankruptcy Judge